In The

Supreme Court of the United States

OCTOBER TERM 1978

—o—

NO. 77-1258

—o—

THE STATE OF MINNESOTA, by
WARREN SPANNAUS, its Attorney General,
Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

—o—

NO. 77-1265

—o—

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

—o—

On a Writ of Certiorari to the Supreme Court of Minnesota

—o—

BRIEF OF RESPONDENT FIRST OF OMAHA SERVICE CORPORATION

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisdiction of the Court was timely invoked by the Petitioners?

2. Whether the State of Minnesota has the power to prescribe a limitation upon the rates of interest which may be charged by any national bank, and especially a national bank located and established in Nebraska?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, the following statutory provisions are pertinent: 28 U. S. C. 2101 (c) (Add. 1); Minnesota Statutes § 56.13 (Add. 1); Nebraska Revised Statutes § 8-820 (Add. 2); 12 U. S. C. § 94 (Add. 2).

STATEMENT OF THE CASE

The Petitioner, Marquette National Bank of Minneapolis (Marquette) filed its Complaint in the District Court for the Fourth Judicial District of Minnesota setting forth five causes of action against First National Bank of Omaha, First of Omaha Service Corporation, and Credit Bureau of St. Paul, Inc. (App. 7a). Count I was effectively disposed of when Marquette voluntarily dismissed the action as to First National Bank of Omaha (App. 5a). Counts III, IV, and V have never been ruled on by either the trial court (App. 123a) or the Minnesota Supreme Court (App. 155a). Consequently, only Count II of that Complaint is presented to this Court.

The Complaint, insofar as it is relevant here, alleges that Marquette is a national bank, having its principal place of business in Minneapolis, Minnesota and is engaged in the operation of a BankAmericard program in which it assesses a $10.00 annual membership fee and finance charges of 1% per month on the average daily balance of customers who elect to defer payment; that

First National Bank of Omaha, a national bank having its principal place of business in Omaha, Nebraska and its wholly owned subsidiary, First of Omaha Service Corporation, had conspired with the Credit Bureau of St. Paul, Inc. to conduct a systematic solicitation of Minnesota residents to participate in a BankAmericard program in which finance charges of 1½% per month on the first $999.99 of the balance were assessed upon the entire previous month's balance rather than upon the average daily balance. This Nebraska BankAmericard program was alleged to be in violation of a Minnesota statute (App. 10a, 11a).

First of Omaha Service Corporation and First National Bank of Omaha filed a petition for removal to Federal Court upon the grounds that a question of federal law was presented.

Marquette filed a motion to remand upon the ground that its causes of action originated under state law (App. 27a).

In view of the assertion by First of Omaha Service Corporation that Minnesota statute 48.185 was unconstitutional by reason of its pre-emption of Federal law, the State of Minnesota intervened as a party plaintiff in the action (App. 77a).

The matter was submitted to the trial ocurt upon a stipulation of facts (App. 91a).

The trial court rejected the claim of pre-emption made by First of Omaha Service Corporation and held that the Minnesota statute was constitutional, that the BankAmericard program of First National Bank of Omaha violated it, and enjoined First of Omaha Service Cor-

poration from participating in or promoting that program in Minnesota (App. 139a).

The Supreme Court of Minnesota, upon appeal, held that 12 U. S. C. 85 had pre-empted the Minnesota statute, that the Omaha bank's program complied with the federal law, and reversed the trial court (App. 155a).

The First National Bank of Omaha's credit card program and that of the Marquette are similar in many respects. However, they differ markedly in others.

In each program funds are advanced or credit given by the banks only at the bank when the credit card voucher is presented (App. 91a). In each program payments are made to the banks at the bank after a statement is mailed to the cardholder (App. 91a).

In the Nebraska program every extension of credit for the purchase of goods and services is made for a minimum of 25 days without finance charge and only the periodic charge is made (App. 91a). In the Minnesota program the only extensions of credit without finance charges occur when the entire balance of the account is paid within 25 days of the statement and an annual fee of $10.00 is charged in addition to the periodic charge.

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SUMMARY OF ARGUMENT

The Respondent argues that the decision of the Minnesota Supreme Court had achieved the requisite finality to start the running of the time in which to seek review in this Court on December 8, 1977. The Petitions for Certiorari were filed more than ninety days thereafter and hence were out of time.

As to the merits, it is argued that Federal law has pre-empted State legislation insofar as defining usury and prescribing remedies therefor where national banks are concerned. Since this action seeks only to apply and enforce a State statute defining usury and purporting to apply directly to national banks and providing a remedy therefor and is expressly and explicitly not based upon the Federal statute, the decision of the court below was correct and its order should be affirmed.

It is further argued that even if this action had been properly brought under the applicable and operative Federal statute, that statute, when properly interpreted in accordance with prior decisions of this court would, on either of two grounds, that is, (1) the Federal statute establishes the maximum rate which could be charged by reference to law of the state where that bank is located, in this case Nebraska, or (2) the Federal statute establishes such rate by reference to the law of the State of Minnesota and both states permit rates in excess of that charged by First National Bank of Omaha, require that the decision of the Court below be affirmed. Finally, it is argued that the statute under which Petitioners proceeded does not extend to or include a case in which there is no bank as a defendant.

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ARGUMENT

I. The petitions for certiorari were not timely filed and this Court lacks jurisdiction to determine this case.

This Court lacks jurisdiction in this case for the reason that the Petitions for Writs of Certiorari were not timely filed.

Congress, in the exercise of its power to prescribe exceptions and regulations of this Court's appellate jurisdiction, enacted 28 U. S. C. 2101 (c) which requires that the writ of certiorari be applied for within ninety days after the entry of the judgment or decree in the court below.

All parties are agreed that the opinion of the Supreme Court of Minnesota which was entered on November 10, 1977 did not become final because a petition for rehearing was filed on November 21, 1977.

All parties agree that the decision of the Minnesota Supreme Court denying rehearing was entered on December 8, 1977.

All parties agree that a document entitled "Judgment" was signed by the Clerk of the Minnesota Supreme Court on December 14, 1977.

Substantial disagreement exists as to which of these latter two events rendered the decision final and started the time for seeking review in this Court.

It would appear clear from the language of the order signed by a justice of the Supreme Court of Minnesota

that the Clerk of that Court was without authority to sign or enter the "Judgment" on December 14, 1978.

The order of the Court which was entered on December 8, 1977 specifically provided:

> "Respondent Marquette National Bank is herewith granted a stay of judgment pending application for a writ of certiorari to the United States Supreme Court."

Thereafter, on March 10, 1978, Respondent filed an application to vacate the stay of judgment (App. 200a), and on April 10, 1978 the Minnesota Supreme Court, by its Chief Justice, denied the motion to vacate the stay (App. 204a).

From the foregoing, it is clear that the court felt that no judgment had been entered. The ministerial act of the Clerk of that Court taken on December 14, 1977 can probably be explained by the provisions of the Minnesota Rules of Appellate Procedure 140 which provides:

> "The filing of a petition for rehearing stays the entry of the judgment. It does not stay the costs."

In any event, it seems clear that the Minnesota Court intended that nothing further should be done in that court until a petition for certiorari was filed in this Court and ruled upon.

In *Department of Banking v. Pink,* 317 U. S. 264 (1942), reh. den. 318 U. S. 802 (1942) this Court ruled that a petition was not timely filed. On June 18, 1942 the Court of Appeals ordered a decision of the Appellate Division of the New York Supreme Court affirmed. On June 25, the Supreme Court made the order of the Court

of Appeals its order. Thereafter a motion to modify the order of the Court of Appeals was filed, considered, and on July 29 granted. This motion did not, however, seek reargument or rehearing. On September 16 the Supreme Court made the order of July 29 its order. The petition for certiorari was filed on October 20. This court decided that the motion seeking modification of the Court of Appeals order was not such that it raised any question concerning the finality of the decision or the rights of the parties and therefore did not toll the running of the time in which review must be sought. The court then went on, because of other questions pending before it in other cases, which questions had recurred frequently, and added a discussion for the guidance of the Bar as to what constituted a final decision by a lower court for the purpose of seeking Supreme Court Review. It said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (***), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (***). Where the order of judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of this judgment for purposes of review is established." 317 U. S. at 268.

See also *Citizens Bank of Michigan City v. Opperman,* 249 U. S. 448 (1919); *U. S. v. Adams,* 383 U. S. 39 (1966); and annotation 10 A. L. R. 2d 1075.

Petitioners rely heavily upon *Puget Sound Power & Light Co. v. King County,* 264 U. S. 22 (1924), a case in which a rehearing had been granted and the case reargued. Under Washington law it was contemplated that in all cases where a decision became final that a judgment would thereafter be entered. That case appears to be in conflict with the later decision in *Department of Banking v. Pink,* supra. It can and should be distinguished from the present case in that the Supreme Court of Minnesota did not contemplate or intend that any judgment be entered in that court until this Court had ruled on the petition for certiorari and did not and does not recognize that any judgment has yet been entered in that court.

It is submitted that the petitions in this Court were not filed within 90 days after the Supreme Court of Minnesota had "in fact fully adjudicated rights and that adjudication is not subject to further review by a state court". Since they were not so filed they were not timely and these petitions should be dismissed for lack of jurisdiction.

II. Federal law (12 U. S. C. 85) pre-empts state law in the area of interest rates chargeable by national banks, and in the remedies to be granted for violation thereof.

The Constitution of the United States provides that federal law is the supreme law of the land and that the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Article IV, Clause 2, U. S. Constitution.

Since at least 1864 the laws of the United States have contained a provision regulating the interest rates which may be charged by a national bank. Section 30 of the National Bank Act of 1864 was described by this Court:

> "These clauses [§ 30] examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject." *Farmers & Merchants National Bank v. Dearing,* 91 U. S. 29 (1875).

At that time, Section 30 contained not only the regulations as to allowable rates of interest, which has now become Section 85 of Title 12 of the U. S. Code, but also the provisions regarding remedies for the violation thereof which are now found in 12 U. S. C. § 86. The Court, in determining that state law could have no effect and had been pre-empted by the Federal statute, said:

> "* * * the States can exercise no control over them (national banks) nor in any wise affect their operation, except insofar as Congress may see proper to permit. Anything beyond this is 'an abuse because it is the usurpation of power which a single state cannot give.'" 91 U. S. at 34.

Similarly, in *Hazeltine v. Central National Bank,* 183 U. S. 132 (1901), this court said:

> "We understand it to be conceded that, as the note is given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act and not by the law of the state." 183 U. S. at 134.

And in *Evans v. National Bank of Savannah,* 251 U. S. 108 (1919), it is said:

> "Respondent is a national bank. Its powers in respect of discounts, whether transactions by it are usurious, and subsequent penalties therefor, must be entertained upon a consideration of the National Bank Act * * *". 251 U. S. at 109.

> "The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts, but its right to retain so much arises from Federal law. The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate." 251 U. S. at 114.

In the light of such authority, and the other precedents of this court, such as *Tiffany v. National Bank of Missouri,* 85 U. S. 409 (1874); *Barnet v. Muncie National Bank,* 98 U. S. 556 (1879); *Daggs v. Phoenix National Bank,* 177 U. S. 549 (1900); *Schuyler National Bank v. Thrush,* 191 U. S. 451 (1903), it is difficult, if not impossible, to believe that anyone can seriously contend that state law can operate directly upon the rate of interest a national bank may charge.

Since Marquette has consistently insisted that its cause of action in this matter arises only under Minnesota statutory and common law (App. 27a), the rule that Federal law is the exclusive basis for determination of the question of interest rates a national bank may charge requires that Marquette's action be held to have been based upon a state statute which, insofar as it applies in this case, has been pre-empted and is of no force or effect. In fact, the Petitioners, upon the record in this case, cannot state a valid cause of action. Neither of them have paid or been charged any interest under First National Bank

of Omaha's credit card program. Inasmuch as 12 U. S. C. 86 provides the exclusive remedy for violation of 12 U. S. C. 85, *Farmers & Merchants National Bank v. Dearing,* supra, they lack standing to complain of a violation of § 85, the only effective statute regulating the rate of interest which First National Bank of Omaha may charge. The Supreme Court of Minnesota's order, therefore, was correct and should be affirmed.

Similar reasoning will compel affirmance of the lower court insofar as the claims of the Attorney General of Minnesota are concerned. He is attempting to defend the Minnesota statute, which purports to regulate the rate of interest a national bank may charge. The State of Minnesota lacks the power to enact such a regulation inasmuch as the federal law prohibits the states from exercising control over national banks or in any wise affecting their operation except as Congress may see proper to permit. *Farmers & Merchants National Bank v. Dearing,* supra.

The argument is made that the Minnesota statute should be sustained since it establishes or creates a "class" of loans, i. e., bank credit card loans, and treats all banks, both national and state, the same. This argument presents an issue neither submitted to nor decided by the courts below. Under *Tiffany v. National Bank of Missouri,* supra, and other cases here cited, it seems clear that although a state has the unquestioned power to enact legislation which discriminates against its own banks, such legislation will not be effective against a national bank. It is submitted that the proper "class" of loan in this matter is consumer credit and that any categorization by type of lender or source of credit such as is here attempted is improper. See *United Missouri Bank of*

Kansas City, N. A. v. Danforth, 394 F. Supp. 774 (D. C. Mo. 1975).

The decisions of this court have clearly established for over 100 years that no state may prescribe the interest rates which national banks may charge since that is a matter for Congress to determine. Congress has determined that the rates to be allowed to national banks will be that allowed by the states where the banks are located. That Congressional determination, however, does not permit a state to establish a rate for national banks that is different from or less than that allowed by its laws to the other lenders. The Minnesota statute attempts to do so and the decision of the Minnesota Supreme Court that it is invalid should be sustained.

Although the briefs of the petitioners devote a great deal of time to the question of the meaning of 12 U. S. C. 85, it is submitted that this Court need not even reach that question to decide this case. Both Petitioners deny that 12 U. S. C. 85 is applicable and seek only to enforce a state statute which has been pre-empted and cannot be constitutionally allowed to operate. This Court should hold that statute unconstitutional and affirm the lower court.

III. Insofar as the rates of interest which may be charged are concerned, federal law gives to national banks a position of the most favored lender.

If this Court feels that the mere determination that the National Bank Act, being the supreme law of the land, pre-empts state legislation is not sufficient to dispose of

this case, then it will be necessary to consider the meaning of 12 U. S. C. 85.

That statute provides, in pertinent part:

> "Any association may take, receive, reserve, and charge on any loan or discount made, * * * interest allowed by the laws of the State, Territory, or District where the bank is located, * * * and no more, except that where by the laws of a State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

That provision has been included in the law since it was adopted as part of Section 30 of the National Bank Act of 1864.

It appears clear from simply reading the statute that it permits a national bank to charge interest at the highest rate allowed by the laws of the State where the bank is located.

Petitioners argue that the statute is silent regarding interstate loans. The statute speaks inclusively. The language is "on *any* loan".

Petitioners argue that the statute appears to be in conflict with a policy of "competitive equality" which they somehow discern as underlying the entire National Bank Act.

Petitioners attempt to argue the "intent of Congress" from legislative history which is far from clear.

These two arguments are intertwined and must be analyzed together. The congressional intent of competitive equality is said to be demonstrated by several in-

stances such as branching, capitalization, conversion and mergers, and fiduciary powers, in which Congress has elected to provide parity between state and national banks. In view of the facts that the Act of 1864 was establishing a new system of national banks, that Congress intended to protect them against state discrimination, and that they were referred to as national favorites by this Court, it is doubtful that such a theory can be supported and this is especially true when the fact that each of the instances which are used to demonstrate such intended equality are based upon statutes enacted by the Congress long after 1864.

The complete answer to such arguments is to be found in the prior decisions of this court. Within 10 years of the adoption of the National Bank Act, this court was called upon to interpret what is now Section 85. *Tiffany v. National Bank of Missouri,* 85 U. S. 409 (1874).

In that case, a national bank had made a loan upon which it charged 9% interest. The law of Missouri generally allowed a rate of 10% but it limited state chartered banks to a rate of 8%. The bank was sued for recovery of the alleged usurious interest. This court held that the National Bank Act was the sole provision of law regulating the rate of interest that a national bank might charge and that a proper interpretation of that act permitted the national bank to charge a rate of interest higher than that allowed to state banks.

In doing so, it said:

> "* * * It cannot be doubted, in view of the purpose of Congress in providing for the organization

of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statute of the state to banks which might be authorized by the state laws, unfriendly legislation might make their existence in the state impossible. A rate of interest might be prescribed so low that banking could not be carried on except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been national favorites. * * *" 85 U. S. at 412, 413.

From that time forward it has been the law that national banks, in the area of usury, are not to be held to a status of competitive equality with state banks but are to be accorded a limited advantage so that they will be permitted to charge a rate of interest at least as high as is allowed to any other lender. This position as the "most favored lender" has been upheld by this court in

several subsequent decisions. See *Farmers & Merchants National Bank v. Dearing,* supra; *Hazeltine v. Central National Bank,* supra; *Evans v. National Bank of Savannah,* supra; *Barnet v. Muncie National Bank,* supra; *Daggs v. Phoenix National Bank,* supra; *Schuyler National Bank v. Thrush,* supra. It has likewise been recognized and followed by lower courts. See *Northway Lanes v. Hackley Union Nat. Bank & Trust,* 464 F. 2d 855 (6th Cir. 1972); *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7th Cir. 1976), cert. den. 429 U. S. 1062 (1977); *First National Bank in Mena v. Nowlin,* 509 F. 2d 872 (8th Cir. 1975); *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8th Cir. 1977); *Hiatt v. San Francisco Nat. Bank,* 361 F. 2d 504 (9th Cir. 1966), cert. den. 385 U. S. 1021; *Acker v. Provident Nat. Bank,* 373 F. Supp. 56 (D. C. Pa. 1974), aff'd in part, rev'd on other grounds, 512 F. 2d 729 (3rd Cir. 1975); *United Missouri Bank of Kansas City N. A. v. Danforth,* 394 F. Supp. 774 (D. C. Mo. 1975); *Commissioner of Small Loans v. First National Bank of Maryland,* 268 Md. 305, 300 A. 2d 685 (1973); *State National Bank of Connecticut v. Cohen,* 32 Conn. Sup. 245, 349 A. 2d 729 (1975); *Fitzgerald v. United Virginia Bank of Roanoke,* 139 Ga. App. 664, 229 S. E. 2d 138 (1976); *Westminster Nat. Bank v. Graustein,* 270 Mass. 565, 170 N. E. 621 (1930); *Cooper v. Nat. Bank,* 21 Ga. App. 356, 94 S. E. 611 (1917); *Farmers Nat. Bank v. McCoy,* 42 Okl. 420, 141 P. 791 (1914).

It has been formally recognized by the Comptroller of the Currency in his regulations. See 12 C. F. R. § 7.7310 (Add. 3). This Court has always given great deference to the interpretation given to a statute by

those charged with its administration. *Udall v. Tallman*, 380 U. S. 1 (1965). While such interpretations were in effect, the Act has been considered and amended by the Congress at least three times. 48 Stat. 191, 49 Stat. 711, 88 Stat. 1558. At least the last of these amendments was apparently designed to permit national banks to make loans at rates higher than would be allowed by some states, was adopted at a time of short credit supply, and to overcome the inertia of the states in amending their interest laws.

In that situation, it would appear to be fruitless to speculate that either "Congressional intent" or changed circumstances should be utilized by this court to change the law. Any change in a doctrine which has been settled in the law for over 100 years, even though it may lead to what some feel are undesirable results, ought to be left to Congress and not undertaken by the courts. See *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963).

The Minnesota Supreme Court must be numbered among those who feel the results are undesirable. It also recognized that the remedy, if any, should come from the Congress:

> "Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created." (App. 168a).

First National Bank of Omaha is entitled to charge interest at the highest rate allowed by the law of the state where it is located by virtue of the provisions of 12 U. S. C. § 85. Petitioners assert, however, that the meaning of "located" is not clear and insist that in this case,

where one of the parties to a loan is a resident in one state and the other party is a resident or located in another state that reference must be made to the law of the state where the borrower resides. Although Marquette makes much of its assertions that the credit card loans here involved are made in Minnesota, we simply point out that the question was neither presented to nor decided by the lower courts in this matter. The stipulated facts make it clear that the credit extended in payment for goods and services in connection with the First National Bank of Omaha's BankAmericard program is advanced by the Bank when the sales draft reaches Omaha (App. 93a). Payments on the credit card account are due and payable in Omaha (App. 94a). Certainly these facts are at least as consistent with the loans being made in Nebraska as in Minnesota. The actions of the merchants and agent banks involved, while they may be said to be extending credit in a technical sense, are more nearly analogous to cashing a check on an out of town bank.

Be that as it may, however, we do not understand the Petitioners' contentions in this regard. Assuming that the activities of the First National Bank of Omaha are such that it could be said that the bank is "existing" in Minnesota, a state of fact not shown by the record, it is still difficult to imagine that it would no longer be "located" in Nebraska. While it may be, and probably is, true that a bank can be located or existing in more than one place, see *Citizens and Southern National Bank v. Bougas*, — U. S. —, 98 S. Ct. 88 (1977), that fact alone would not change the meaning or application of the Federal statute when it authorizes the bank to charge inter-

est at the rate allowed by the law of the state where it is located. If that is indeed the fact, it would seem that the result would be to permit the bank to charge interest at the rate allowed by the law of either state since it is located in both. This result is clearly in accordance with both of the Circuit Court opinions. *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7 Cir. 1976), cert. den. 429 U. S. 1062 (1977); *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8 Cir. 1977).

The essential weakness of the Petitioners' arguments that § 85 does not apply to loans made to residents of one state by a national bank located in another state is perhaps best demonstrated by their citation of and reliance upon *Meadow Brook National Bank v. Recile,* 302 F. Supp. 62 (E. D. La. 1969) as the only judicial authority supporting their position. The trial court in that case entered an order granting a new trial (See App. 7, Respondent's Brief in Opposition to Certiorari). In that state of the record it cannot be said to be authority for any proposition, yet only the amicus Conference of State Bank Supervisors had the integrity to advise the Court of that fact.

Nor can the argument that the result in this case permits Nebraska to export its interest rates withstand examination. It is obvious that the Federal law, which is effective in both Minnesota and Nebraska and hence needs no exportation, is the law which establishes the permissible interest rates in this case. Even if that were not so, and if it were either possible or necessary to establish that the loans here involved took place in either Minnesota or Nebraska, obviously the law of one of those

states would have to be exported. There is nothing in the record upon which to base a judgment as to which should prevail. If a decision were to be made on that basis a great many factors would have to be considered, among which are:

1. Is a bank credit card program a necessary and desirable service for the people?
2. If so, can such a program exist under the laws of Minnesota?
3. If not, is the desirability of such a program sufficient to outweigh the policy underlying the Minnesota laws?

Merely to state these questions demonstrates the inadequacy of this record to support any decisions which must necessarily reflect the answers.

Petitioners attempt to argue that the *Alden* cases (*Alden's Inc. v. LaFollette,* 552 F. 2d 745 (7th Cir. 1977), cert. den., — U. S. — (1977), and *Alden's Inc. v. Packel,* 524 F. 2d 38 (3d Cir. 1975), cert. den. 425 U. S. 943 (1976) somehow support their argument. Those cases are clearly distinguishable since they do not involve any question of supremacy of Federal law over state law. Further, if they had done so it is clear that their result would have been different. The Third Circuit Court said:

> "We suggest, then, that the commerce clause limits the power of a state to impose its choice of law on any transaction that is within the broad ambit of congressional power to regulate interstate commerce and
>
> (1) is one in which Congress has made its own choice of law:" 524 F. 2d at 45.

Since 12 U. S. C. 85 clearly contains a choice of law by Congress, the state could not, under that decision, impose its own choice.

IV. The rates charged by First National Bank of Omaha in its BankAmericard program are authorized by 12 U. S. C. 85, whether reference is made to the law of Minnesota or the law of Nebraska.

Under the most favored lender doctrine as established by 12 U. S. C. 85 and the decisions of this Court, First National Bank of Omaha is entitled to charge the highest rate allowed by the law of the state in which it is "located, organized or existing". It is clear that such rate need not be established by the statutory law of the State. *Daggs v. Phoenix National Bank,* 177 U. S. 549 (1900). It is equally clear that if state law allows a higher rate to some lenders than to state banks, the higher rate is allowed to national banks in that state. *Tiffany v. National Bank of Missouri,* supra.

Application of this principle to the present case will reveal that the arguments of the petitioners and of the amicus curiae are largely groundless or are completely unsupported by the record.

These include Minnesota's arguments concerning its public policy and the protection of its citizens against excessive interest charges, Marquette's argument that the decision somehow places it at a competitive disadvantage, the State Bank Supervisor's argument that unless state banks are permitted to charge as much as national banks they cannot continue to operate, and the argument of the

AFL-CIO that it has an interest in protecting its members from excessive charges.

Perhaps the first point to be made is that it is not shown, and cannot be determined from the record, whether the Minnesota credit card rate, taking the $15 annual fee into consideration, is higher or lower than the Nebraska rate of 18%. It can be mathematically determined that on any account which has an average deferred balance of $250 the charges are the same. It can be similarly determined that on any account with a smaller average deferred balance the Minnesota charges are greater. Likewise, on accounts with a larger average deferred balance the Nebraska charges would be greater ($250 x 18%=$45; 250 x 12%=$30 + 15=$45). As to the total return a bank can expect on its credit card program, an essential element of the argument of the State Bank Supervisors, no conclusions can be reached without a great deal more evidence. Certain inferences can be drawn from the fact that this action is not brought by a consumer or even on behalf of a class of consumers who are claiming that they are being overcharged. Rather, it was brought by a bank in an effort to prevent another bank from entering its market and competing with it. This becomes especially interesting in view of the fact that Minnesota law allows consumer loans by small loan companies in which interest is charged at a rate of 33% on the first $300, 18% on the next $300, and 15% on the next $600 loaned. This is a composite rate on the first $1,000 of 21.4%. Minnesota Statute 56.13. Since the Marquette has elected not to charge that rate of interest, a rate which, as a most favored lender it could charge, it might be reasonably inferred that the actual return on its overall program is

greater when it charges the lower percentage rate and in addition collects the annual fee. This is a likely result in view of the proportion of credit card accounts which are paid in full on a monthly basis and which, without the annual fee, would generate no income for the bank.

In any event, it is quite clear that both Nebraska (§ 8-820 Neb. Rev. Stat. (Add. 2)) and Minnesota (Minnesota Statute § 56.13 (Add. 1)), do, by statute, allow rates of interest as high or higher than that charged by First National Bank of Omaha and that the law of either state would permit the Omaha bank, as a most favored lender, to charge those rates.

This being the case, the judgment of the Minnesota court should be affirmed.

V. There are alternative grounds upon which the judgment of the Minnesota Court should be affirmed.

Although the Minnesota court's decision was a correct application of 12 U. S. C. 85 and should be affirmed upon that ground, there are alternative reasons for its affirmance. This case does not involve a defendant bank, nor for that matter any defendant which charges or collects any interest or finance charges at all, and is therefore not within the Minnesota statute.

Subdivision 7 of Minnesota Statute 48.185 specifically provides that an action of this nature may be brought against a *bank or savings bank*. This action was originally brought against First National Bank of Omaha and complied with the Minnesota statute. The plaintiff, for reasons known only to itself, but probably in an effort to

avoid the effects of 12 U. S. C. 94, which would have required that the case be tried in Nebraska, dismissed the action as to the Bank. It thereby took the matter outside the scope of the statute which in itself would justify dismissal.

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CONCLUSION

Since the Petitions for Writ of Certiorari in these cases were not timely filed, they should be dismissed for lack of jurisdiction. If that is not done, the decision of the Supreme Court of Minnesota should be affirmed since it correctly interpreted and applied the controlling federal statute.

Respectfully submitted,

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Dated this 26th day of July, 1978.

ADDENDUM

28 U. S. C. 2101 (c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Minnesota Statutes § 56.13. Limitation of Loans; Interest; Investigation Charge. Subdivision 1. Every licensee hereunder may lend any sum of money not to exceed $1,200 in amount, and may contract for and receive thereon a charge at a rate not exceeding two and three-quarters percent per month on that part of the unpaid principal balance of any loan not exceeding $300, one and one-half percent per month on that part of the unpaid principal balance of any loan in excess of $300 but not exceeding $600, one and one-quarter percent per month on any remainder of such unpaid principal balance; provided in addition the licensee may collect from the proceeds of any loan an investigation charge of $1 for each $100; or fraction thereof, of the principal amount loaned, for expenses including any examination or investigation of the character and circumstances of the borrower, comaker or security, and drawing and taking the acknowledgment of necessary papers, filing fees, or other expenses incurred in making the loan; provided that no such charge shall be collected unless a loan shall have been made. The full amount of the investigation charge authorized by this subdivision shall be fully earned by the time a loan is made

without regard to the expenses incurred and shall not be deemed interest; provided, however, if a loan for which an investigation charge was made is renewed within 12 months from the date of the loan, then 1/12 of such investigation charge shall be deemed earned for each month or portion thereof from the date of the loan to the date of renewal, and the balance thereof shall be refunded to the borrower. A loan shall be deemed to be renewed at the time the loan is paid in full if any part of such payment is made out of the proceeds of another loan from the same or affiliated lender. Not more than six months of accrued charges on the unpaid principal balance shall be included in any judgment entered on any loan made hereunder.

Nebraska Revised Statutes § 8-820. Personal loans; interest on unpaid balance; fee in lieu of interest. Subject to the provisions of sections 8-815 to 8-829, any registered bank may contract for and receive, on any personal loan, charges at a rate not exceeding eighteen per cent simple interest per year on the first one thousand dollars and twelve per cent simple interest per year on the balance over one thousand dollars. Notwithstanding the provisions of this section, a bank may charge a minimum fee of five dollars in lieu of interest on small loans.

12 U. S. C. § 94. Venue of suits. Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

12 C. F. R. § 7.7310. A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law, relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company or morris plan bank, without being so licensed.